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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 745.

THE SCHENECTADY UNION PUBLISHING COMPANY,
Petitioner,
against
MARTIN L. SWEENEY.

BRIEF FOR NEW YORK STATE PUBLISHERS ASSOCIATION AS *AMICUS CURIAE*.

The New York State Publishers Association is concerned with this case because the rule of privileged comment as stated in the majority opinion of the Circuit Court of Appeals in this case (R. 27-33; 122 Fed. 2nd 288), alters the New York rule as heretofore understood by New York State Publishers and such change we assert is an intrusion on the freedom of the press.

The publication here charged as libel *per se* is not such when measured by the previous standards established by the New York Courts and the new rule applied by the Circuit Court here violates the constitutional guarantee of freedom of the press (U. S. Constitution, Amendment 1), and the provisions of Article I, Subdivision 8 of the New York State Constitution.

Statement of the Case.

The petitioner seeks on writ of certiorari to this Court to review a judgment of the Second Circuit Court of Appeals (R. 36) which reversed a judgment of the District

Court for the Northern District of New York, which judgment dismissed a complaint for libel on the ground that it failed to state a cause of action for libel *per se* against the petitioner (R. 23-24). The publication alleged to be libelous was published on December 23rd, 1938, in the newspaper "The Schenectady Union Star," published by the petitioner in the City of Schenectady, New York, as a part of a column under the title "Washington Daily Merry-Go-Round" and read as follows (R. 3):

> "A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.
>
> "The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.
>
> "This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.
>
> "Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States. Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.
>
> "Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment."

The pertinent question here is whether such publication is in, and of, itself a libelous publication under the law of New York State and more particularly, whether the assertion that a Representative in Congress opposed a Federal appointment because the proposed candidate was a Jew and foreign born is a statement libelous *per se.*

The libel in the case at bar was published in New York State and therefore under the ruling of the Supreme Court of the United States in *Erie Railroad vs. Tompkins,*

304 U. S. 64, and under the Rules of Decisions Act, 28 U. S. C. 725, the law of New York in regard to libel must alone control.

POINT I.

The New York rule permits privileged comment on the acts of public officials or matters of public concern.

The democratic process requires that a broad latitude be given to the discussion and criticism of the acts of public officials. The general rule of privileged comment both in Federal and New York State jurisdictions is that the doctrine of privilege and the law of libel permits the honest censorship by the newspaper press over the conduct of officials in the management and control of public affairs.

Gandia vs. Pettingill, 222 U. S. 452, 32 S. Ct. 127.
Ashford vs. Evening Star Newspaper Co., 41 App. D. C. 395.
Hoeppner vs. Dunkirk Printing Co., 254 N. Y. 95.
Bingham vs. Gaynor, 203 N. Y. 27.
Hills vs. Press Co., 122 Misc. 212, affd. 214 A. D. 752.
Hamilton vs. Eno, 81 N. Y. 116.

In the *Gandia* case, Justice Holmes in his opinion for the Court enunciated the following rule:

> "So far as the facts were concerned, the publication of them alone was not libelous. For apart from the question whether attributing to the plaintiff conduct that was lawful as the plaintiff says, could be a libel, he was a public officer in whose course of action connected with his office the citizens of Porto Rico had a serious interest, and anything bearing on such action was a legitimate subject

> of statement and comment. It was so at least in the absence of express malice."

The New York rule also stated in *Hamilton vs. Eno*, 81 N. Y. 116, decided by the Court of Appeals in 1808 (p. 127):

> "We are of the opinion that the official act of a public functionary may be freely criticised, and entire freedom of expression used in argument, sarcasm and ridicule upon the act itself."

This rule has been followed in New York and repeated again and again and was stated by Justice Crane in the case of *Hoeppner vs. Dunkirk Printing Company*, 254 N. Y. 95, at page 99:

> "Everyone has a right to comment on matters of public interest and concern provided he does so fairly and with an honest purpose. Such comments or criticisms are not libelous, however severe in their terms unless they are written maliciously."

And in *Hills vs. Press Company*, 122 Misc. 212, affirmed 214 App. Div. 752, the Court stated at page 215:

> "The acceptance of public office in effect confers the privilege to criticize one's acts because of the public interest in official administration. Criticism which is untrue may be unjust but no one can reasonably give to it an effect greater than the law puts upon it and greater than fair public opinion would ascribe to it."

The daily newspaper occupies a unique position in the daily life of every citizen in that it provides a medium of transferring news events of current interest to the doorstep of its readers and also through its function of critic and censor characterizes such events either as favorable to, or detrimental to, the public welfare as a whole. To insure a democratic government and to protect the civil liberties of the citizens of our country the press must be

protected in its right to comment and criticize or else its function as an instrument of public service will be destroyed.

The most recent judicial expression on the right to comment and criticize a public official by the press was made in the decision of the case of *Hall vs. Binghamton Press Company* in the Appellate Division, Third Department of the New York State Supreme Court rendered on the 4th day of March, 1942. Justice Bliss in his concurring opinion, holding that the complaint in that action did not state a cause of action libelous *per se* makes the following statement in his opinion:

> "Ours is a representative government and one who assumes to represent our citizens in a legislative hall must expect that his acts will be commented upon and criticised. When the safety of the nation is at stake strong men do not mince matters and neither the citizen nor his representative can be squeamish about it. Freedom of speech and press are guaranteed to us in our form of government and it is the right of the free press to criticise severely and of a free citizenry to speak plainly to and of its representatives. If they believe that the acts of such representatives are opposed to the national interest it is not only their privilege but their duty to say so."

The New York Courts have thus recognized the function and the duty of the press to present comment and criticism of the public acts of public officials as part of its service to promote the public interest. It has been the rule established by the Courts of New York that the limits to be placed upon the right of privileged comment by the press should be confined to publications reasonably considered as fair comment and criticism.

Briarcliff L. Hotel vs. Citizen Sentinel Publishers, Inc., 260 N. Y. 106.

Tanzer vs. Crowley Publishing Corp., 240 A. D. 203.
Foley vs. Press Publishing Co., 226 A. D. 535.
Hills vs. Press Company, 122 Misc. 212, affd. 214 A. D. 752.

The New York definition of fair comment applicable to publications referring to public officers appears from the opinion of Judge Crane in the *Briarcliff* case to be as follows:

> "A comment is fair when it is based on facts truly stated and free from imputations of corruption or dishonest motives on the part of the person whose conduct is criticized and is an honest expression of the writer's real opinion or belief. Mere exaggeration, slight irony or wit or all those delightful touches of style which go to make an article readable do not push beyond the limitations of fair comment."

In the case of *Tanzer vs. Crowley Publishing Corp.*, 240 A. D. 203, the defendant published an attack upon a former mayor of Little Falls, New York, charging that the plaintiff while mayor, had appointed a certain person as city attorney to protect a client of the appointee. The Appellate Division dismissed the complaint, stating at page 204:

> "In our view, the language used in the article is not libelous but at most consists of comment and criticism of a public official which falls within the limit of the privilege of a newspaper to print and carry in the public interest and welfare * * * one who holds a public office must expect criticism. It may be captious, ill timed and without foundation and fact but outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely there is no libel."

In the case of *Hills vs. Press Company, supra*, the plaintiff suing the defendant for libel, charged that the

defendant had printed articles charging the plaintiff with favoritism in his office as a county fuel administrator, and with unfairness and inactivity in his work and the enforcement of orders. The Court, holding that the publication was not libelous *per se*, stated:

> "To summarize, it may be stated that it is held as matter of law that the publications are not libelous *per se* in that they do not impute the commission of a crime, or tend to bring the plaintiff into ridicule and contempt, or disparage him in his office or tend to show him unworthy of a public trust."

The long line of authorities on the subject of fair comment established by the Courts of New York State follow the foregoing limitations on the right of newspapers to comment and such limitations have become the accepted standards by which publishers measure the privilege extended to them for censorship of the acts of public officials. Public opinion of course places a definite limitation upon the propriety of comment and the publishers recognize that boundaries must be established somewhere. However, having accepted the judicial limitations as heretofore set forth as the proper boundary line for fair comment, the New York State Publishers Association strongly urges that such limitation should not be restricted to a further degree and any such restriction as that imposed by the present opinion in the Circuit Court of Appeals in this case becomes rather an intrusion beyond the guarantees of free exercise of comment and freedom of the press, as provided for by the Federal and New York State Constitutions.

POINT II.

The alleged publication herein is not libelous *per se* under the controlling law of New York State.

The publication which has been alleged to be libelous *per se* was to the effect that Congressman Sweeney opposed the appointment of one Freed to the position of United States District Judge because he was "a Jew and foreign born." The appointment of any individual to a position in the Federal Government is a matter of public concern and interest and certainly the act of an elected official in either promoting or opposing such an appointment is an event which the public has a right to be informed of and a matter that is entitled to criticism and comment by individual and press alike.

The question of whether there was opposition to the appointment of Mr. Freed was certainly of importance to the citizens of the country who depend upon the courts for impartial justice and who deserve to have the highest caliber of citizen promoted to those positions. The public has an inherent right to be informed of the favorable and unfavorable attributes of those proposed for Federal positions. Thus, the fact that there was any opposition at all to Freed's appointment was of value to the interested public and the further fact that a public officer was using the influence of the office bestowed upon him by public consent to oppose the appointment of a Federal judge was not only a subject for comment but it was an obligation of the press to so comment.

Petitioner's publication was made in the line of duty and as a part of its performance for the public interest to promote the public welfare.

The comment on the acts of Congressman Sweeney alleged to be libelous *per se* in this action was not a criticism resulting in a charge of corruption or gross incompetence, holding him up to disgrace and contumely. It was a criticism of the poor judgment of the basis for his opposition to Freed's appointment. The publication does not charge a crime, nor tend to bring him into ridicule and contempt or disparage him in his office or tend to show him unworthy of a public trust. The fact that many will disagree with the grounds of his opposition does not transform the publication into libel any more than if the publication had stated that he opposed Freed because he was a Republican or a New Dealer. The elements necessary to make the publication transgress the boundaries of fair comment as established by the New York Courts are lacking here and the publication is therefore not a publication libelous *per se*.

In the very recent case of *Hall vs. Binghamton Press Company* the question of the law of libel in relation to the acts of a public official was involved. The defendant was charged with publishing editorials referring to Congressman Hall, the Representative of the Thirty-fourth Congressional District of New York State, and criticizing him for casting his vote against the Lend-Lease Bill. Among the many statements made in the editorial, the following is a typical example of the comment charged with libel:

> "It seems in order, to ask you at this juncture whether you do feel that this country should be defended against unAmericanism or whether you are going to take the line of least resistance and wind up with the Quislings."

The editorials, in spite of the personal references, were held by the Appellate Division, Third Department of the New York State Supreme Court, not libelous *per se* and

the complaint in that action was dismissed by decision in the Court rendered on March 4, 1942.

In the opinion of the Court, Presiding Justice Hill stated:

> "In times like those through which we have recently passed, the doctrine of fair comment should be extended as far as the authorities will permit. With unprecedented social and governmental conditions, our own institutions threatened, national legislators who participated in the formation of governmental policies should be held to the strictest official accountability. History has shown that this is promoted through free exercise of the right to criticize official acts. The people furnish the legislators with an extensive and expensive secretariat, give them the right to use the mails at public expense. Their colleagues are generous in granting leave to print. With these opportunities for personal praise and propaganda, opposition newspapers and editorial writers should not be limited to weak, tepid and supine criticism and discussion.
> • • •
>
> "Criticism as to matters of public interest and concern is privileged so long as the criticism is fair with an honest purpose and not intemperate and malicious. The protecting privilege is not lost because the discussion brings embarrassment to the official."

and Justice Bliss in his concurring opinion states:

> "If the press or our citizens honestly believe that the acts of a legislative representative lend comfort to our nation's enemies there must be no question about the right to tell him just that in no uncertain terms. Queasy words will not do. How else can a democracy function? If the citizens believe such acts may be setting up a government of Quislings, they must have the right to say so. It is one of the verities of democracy that eternal vigilance is the price of liberty. The courts may not muzzle those

who maintain such vigilance. Great issues require strong language. If a legislator's vote cannot be criticized as being opposed to the national interest, then there is no field of fair comment.

"In this light the editorials were but fair comment and criticism of a public official. The editorials themselves are wholly free from any imputation of corrupt or dishonorable motives and none of them accuse the plaintiff of being personally corrupt or dishonest."

The New York State Publishers Association respectfully urges that the rule applied by the Appellate Division in this most recent case represents the applicable rule as enunciated by New York Courts and as understood by New York publishers in relation to comment on the acts and words of public officers.

The evil of narrow-minded bigotry and oppressive intolerance condemned by the opinion of Judge Chase in the Circuit Court is in fact fostered and nourished by the very rule there established by the Court. It is true that the practices of "that one foreign dictator, which included large-scale unreasonable persecution," have received violent disapproval in our country where liberty and freedom of thought and action still prevail.

Yet, the success of those Hitlerite practices can be traced and accredited to the fact that press censorship was dormant and totally absent in the country where such wholesale intolerance was permitted to get a strong foothold, to the extent that absolute dictatorship was built on the theory of extensive oppression of a minority.

The danger to be anticipated and guarded against is that under the protection of the rule of the Circuit Court in this case the force of the press to exercise its proper function of critic and censor of any acts tending to sow the seeds of intolerance, sedition and treason would be shackled and rendered useless. As Justice Clark sug-

gested in his minority opinion if we adopt the rule as presented by the majority opinion in the Circuit Court "we shut off all healthy criticism of prejudice and allow bigotry full scope to act with impunity."

The New York State Publishers Association vigorously urges that in these times the protection of the freedom of the press is imperative to insure a future world in which the principles of democracy will be recognized and practiced. This is not the time to change an age-worn rule of law and substitute in its place a new definitely disturbing rule of law.

In *Howarth vs. Barlow,* 113 App. Div. 510, the Appellate Division setting aside a libel verdict for plaintiff, says (p. 514):

> "The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government but only in a despotism. On the contrary, they have a right to speak out in open discussion and criticism thereof, the only test being that they make no false statement; and this is the great safeguard of free government and of pure government. This is fundamental among us."

Recently commenting on the surrender which the English people have had to make of their traditional liberties, Geoffrey Crowther, the editor of the London Economist, offers us this advice:

> "If I were an American, I should not be frightened by the concentration of powers, even arbitrary powers, in one pair of hands. On the contrary, I should be alarmed by any failure to concentrate powers since the effectiveness of the whole national effort may depend upon decisions being taken with speed and resolution. But I should watch with an eagle eye any attempt to abate criticism, stifle the expression of opinion—any opinions short of sedition."

It is this precious right—the right of criticism and fair comment—that is before this Court for decision.

The New York State Publishers Association respectfully commends that the decision of the Circuit Court of Appeals be reversed and that the New York State rule be applied and reaffirmed.

POINT III.

The judgment of the Circuit Court of Appeals should be reversed and the judgment of the District Court reinstated.

Respectfully submitted,

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